

### REMARKS

Applicants respectfully request entry of the amendments and remarks submitted herein. Claims 1, 34, and 38 have been amended. Claims 1-8, 26, 27, 30, 33, 34, 37, 38, and 40 are currently pending and claims 9-25, 28, 29, 31, 32, 35, 36, and 39 are withdrawn. Reconsideration of the pending application is respectfully requested.

#### The Claim Objections

Claim 1 stands objected to because the word "fracture" is misspelled. Applicants have corrected the spelling error in claim 1 (as well as in claims 34 and 38). In view of the amendment herein, Applicants respectfully request that the objection to claim 1 be withdrawn.

#### The Double Patenting Rejections

Claims 1-3 and 5 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 2 of U.S. Patent No. 6,755,831.

Applicants submit herewith a Terminal Disclaimer. The enclosed Terminal Disclaimer disclaims the terminal portion of the term of the entire patent to be granted from this application. The enclosed Terminal Disclaimer complies with 37 CFR §1.321. In view of the enclosed Terminal Disclaimer, Applicants respectfully request that the rejection of claims 1-3 and 5 under the judicially created doctrine of obviousness-type double patenting be withdrawn.

#### The 35 U.S.C. §102 Rejections

Claims 1-8, 26, 27, 33, 34, 38, and 40 stand rejected under 35 U.S.C. §102(b) as being anticipated by Esser (U.S. Patent No. 6,096,040). The Examiner asserted that Figures 16-18 and 23 of Esser show a fixation plate kit for fixation of a distal radius fracture having all the limitations as recited in the above-listed claims. The Examiner asserted that Applicants' claimed "at least one tine" is the equivalent of a bone screw in the Esser patent. Similarly, the Examiner asserted that Applicants' claimed "at least one tensioning device" are equivalent to any one of the bone screws in the proximal portion of Esser's plate. With respect to Applicants' tine being configured as an "articulating member," the Examiner asserted that the bone screw of Esser,

when placed through any hole, would have the inherent capability to articulate at least a few degrees in every direction. This rejection is respectfully traversed.

A tine as claimed in the pending claims is not the equivalent of a bone screw. Pages 9, 12, and 14, and Figures 31 and 32 clearly indicate that the tensioning device (or a connector) can be a bone screw, but a tine is never disclosed or embodied as a bone screw in the instant specification. In fact, the size of tines and bone screws are significantly different. Compare, for example, the disclosure on page 9 and the disclosure on page 12. The disclosure of Esser does not anticipate pending independent claims 1, 34, and 38.

In addition, the tines and their articulating capability can not be compared with the "few degrees" a bone screw could potentially articulate in the device of Esser as asserted by the Examiner. The specification discloses, at page 17, that the "tines 715 and 720 extend at an angle from the second section 710 but are generally perpendicular to the first section 705, although a range of angles around the perpendicular is permissible. For example, the angles can range from between approximately 75° and 115° and more particularly between approximately 85° and 105°." The bone screw of Esser is not configured to articulate, and Esser does not teach or suggest an articulating tine.

Esser does not teach each and every element of the claimed invention (a plate, a tine, and a tensioning device). In view of the amendments and remarks herein, Applicants respectfully request that the rejection of claims 1-8, 26, 27, 33, 34, 38, and 40 under 35 U.S.C. §102(b) be withdrawn.

Claims 1-4, 6-8, 26, 27, 30, 33, 34, 37, 38, and 40 stand rejected under 35 U.S.C. §102(e) as being clearly anticipated by Orbay et al. (U.S. Patent No. 6,440,135). The Examiner asserted that Figures 25-28 and the associated disclosure in Orbay et al. show a volar fixation system having all the limitations recited in the above-listed claims, and include tines that are specifically configured for articulation. Applicants respectfully traverse this rejection.

Applicants submit herewith a Declaration under 37 CFR §1.131 executed by Dr. Matthew D. Putnam that indicates that the date of the instant invention was prior to the December 12, 2000 filing date of Orbay et al. In view of the attached Declaration, the Orbay et al. patent is not available as prior art under 35 U.S.C. §102(e), and Applicants respectfully request that the

rejection of claims 1-4, 6-8, 26, 27, 30, 33, 34, 37, 38, and 40 under 35 U.S.C. §102(e) be withdrawn.

#### Withdrawn Claims

Following the Restriction Requirement of January 6, 2005 and Applicants' election of February 7, 2005, the Examiner additionally withdrew claims 9-14, 28, 29, and 36 as reciting limitations not consistent with the elected species. The Examiner asserted that with respect to the elected plate species, a "review of the disclosure relevant to this elected species reveals that the sum total of specific details are found in the last paragraph of page 18 and finishing on page 19. Nowhere in this brief section of disclosure are found any of the limitations as to range of angles between the distal and proximal portions of the plate and tine extension angles..."

Contrary to the Examiner's assertions, a fixation plate configured as a distal radius volar fixation plate and a kit containing such a plate is disclosed from page 16 (the first full paragraph) through page 19. In addition, the specification, on page 16, states that "any and all of the techniques and devices related to fixation plates described above can be applied to the distal radius volar fixation plate 700." Given the instant disclosure, the claims withdrawn by the Examiner are, in fact, consistent with the elected species.

#### Request for Rejoinder

Claims 9-25, 28, 29, 31, 32, 35, 36, and 39 stand withdrawn as directed to non-elected species. Since independent claims 1, 34, and 38 should be allowable in view of the remarks herein, Applicants respectfully request that claims 9-25, 28, 29, 31, 32, 35, 36, and 39 be rejoined and allowed pursuant to MPEP §809.02(c)(B)(1).

Applicant : Matthew D. Putnam et al.  
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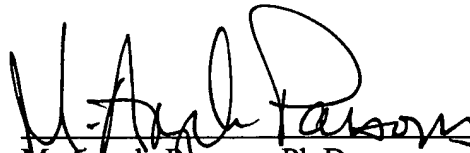
CONCLUSION

Applicants respectfully request allowance of claims 1-40. Enclosed is a \$575 check (\$510 for the Petition for Extension of Time fee and \$65 for the Terminal Disclaimer fee). Please apply any other charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

Date:

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